August 3, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Washington Electric Cooperative/Downs Rachlin Martin PLLC
Date of Filing:	January 5, 2006
Case Number:	TFA-0141

On January 5, 2006, Downs Rachlin Martin PLLC (Downs) filed an Appeal from a determination issued to it by the Department of Energy's National Energy Technology Laboratory (NETL). In that determination, NETL released some documents in response to a request for information that Downs filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NETL to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

Washington Electric Cooperative (WEC) is a consumer-owned, not for profit utility in Vermont. WEC received a grant from DOE to assess the general feasibility of developing a utility scale wind generation project in Vermont ("the UPC project").[1] On July 25, 2005, Downs, a Vermont law firm, submitted a FOIA request to DOE for copies of "any and all documents in DOE's possession related to the NEPA analysis, use of funds by Washington Electric Cooperative (WEC) for the UPC (wind management) project and any correspondence between DOE and WEC and/or UPC regarding site clearing and construction at the Sheffield site prior to a final NEPA decision . . . ." Letter from NETL to Downs, November 15, 2005 (Determination Letter). NETL searched and found several responsive documents. Some documents were returned to the submitter of the information for its review and opinion concerning releasability under FOIA. NETL released two documents, the

1 UPC Vermont Wind, LLC is a consulting firm.

cooperative agreement and Modification 1, in their entirety. NETL also released copies of all documents in its possession with regard to the NEPA determination. However, some of the NEPA documents were redacted pursuant to FOIA Exemption 5, which protects the decision-making processes of government agencies and attorney work product. NETL also redacted some documents under Exemption 4, which protects trade secrets and commercial or financial information. NETL stated that it would charge Downs $200 for fees for the search and duplication of responsive documents in the determination.

In the Appeal, Downs argues that the material withheld under Exemption 4 seems to be standard expense reports that could shed light on the project, not privileged commercial information. Downs further contends that the material withheld under Exemption 5 seems to be routine correspondence that specifically describes how the project is to proceed and the justification for a no-cost time extension. Downs also requested a waiver of charges because only 70 pages were provided, "far below the 100 pages usually offered to a requestor for free." Downs finally argues that the responsive material will enable Downs to improve the public understanding of the DOE's grant-making activities and thus is in the public interest and will not be used for commercial purposes.

II. Analysis

A. Exemption 4

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Thus, in order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial or financial, obtained from a person and privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770. Information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

1. Confidential Material

Information submitted in a procurement process is considered submitted involuntarily, and thus the *National Parks* test applies in this case. *Glen M. Jameson*, 26 DOE ¶ 80,236 (1997). In response to this Appeal, NETL provided us with unredacted and redacted copies of the responsive material, along with detailed comments explaining their withholding. *See* NETL Comments (March 17, 2006). We have reviewed the material withheld under this exemption and find that the deleted information was properly withheld under the *National Parks* test. First, the information withheld was clearly commercial information. The withheld material referred to costs and plans for the UPC

project, along with marketing strategies and personnel information. Second, the information was obtained from WEC, a corporation. We have previously found that corporations are deemed "persons" for purposes of Exemption 4. *See Myers Bigel Sibley & Sajovec*, 27 DOE ¶ 80,225 (1999). Third, the exempt material is confidential. After reviewing the unredacted documents, we find that the six documents were properly considered confidential for purposes of Exemption 4 because their disclosure is likely to cause substantial harm to the competitive position of two corporations, WEC and UPC, if released. For instance, the type of information withheld (e.g., project cost and expenses, business strategy, discussions with potential teaming partners), if released, would provide competitors of WEC and UPC with information that could be used to gain unfair advantage against the two firms in future procurements.

If an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm to a person, it must state the reason for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Southern California Edison*, 28 DOE ¶ 80,177 (2001). In its determination, NETL described the six documents redacted under Exemption 4 and then stated:

> These documents contain information concerning business investments: total and itemized investments in planning, regulatory review and studies; vendors used to perform work; information about negotiations and business strategy; and strategic business planning and regulatory analysis.

Determination Letter at 2. NETL then listed a description of each type of information withheld (e.g. description of commercialization strategy, labor hour estimates, specific results of market research, proprietary product performance information) and instructions on how to appeal the determination. *Id.*

After examining unredacted copies of the six documents that were withheld under Exemption 4 as confidential, we find that NETL properly withheld the redacted information in the material released to Downs. [2] As stated above, project expenses and information concerning the submitter's business strategy were properly withheld under Exemption 4. NETL has adequately justified its reason for the withholdings and meets the requirements set forth above in *Larson.* Accordingly, we shall deny this portion of the Appeal.

2. Privileged Material

In its determination, NETL also added that Item 3, one of the six documents mentioned above, "contains information concerning WEC's legal counsel's work product and attorney-client communications which would also be protected by Exemption 5's attorney work product and attorney-client privileges." Determination Letter at 2. Item 3 is a fax cover sheet and portion of a memo from UPC's attorney to UPC. The express language of Exemption 4 and the legislative

2 We also note that NETL has properly released reasonably segregable portions of the documents to Downs pursuant to 5 U.S.C. § 552(b).

history of the FOIA provide that information submitted to the government that would normally be privileged can be withheld under Exemption 4. *See Sharyland Supply Corp. v. Block*, 755 F.2d 397, 399-400 (5th Cir. 1985); *Washington Post Co. v. Department of Health and Human Services*, 795 F.2d 205 (D.C. Cir. 1986); *Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144 (D.D.C. 1979) (withholding attorney-client privileged information under Exemption 4). The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *California Edison*, 28 DOE ¶ 80,173 (2001). *See also Charles Varnadore*, 24 DOE ¶ 80,123 (1994). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254 n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id.* at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S.Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665.

We examined Item 3, a fax cover sheet with an excerpt from a memo prepared by UPC's attorney. Item 3 specifically addresses a question for which UPC has requested a written legal opinion. This document reflects the transmission of legal advice from attorney to client. *See Miller, Anderson, Nash, Yerke & Wiener v. United States Department of Energy*, 499 F. Supp. 767, 771 (D. Or. 1980) (upholding attorney-client privilege of legal memorandum prepared for a utility company by its attorney). It is not a social, informational or procedural communication between the attorney and his client. Thus, we find that Item 3 is protected by the attorney-client privilege, and was properly withheld under Exemption 4. [3]

B. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856

3 We disagree with NETL's conclusion that Item 3 is also protected by the attorney work product privilege. This privilege does not extend to every written document generated by an attorney--it is limited to documents that reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). There is no evidence in the record that this document was prepared for trial or in anticipation of litigation. *See Charles Varnadore*, 24 DOE ¶ 80,123 at 80,556 (1994).

(D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters. Downs has appealed NETL's use of the deliberative process privilege on the argument that the withheld materials appear to be "rather routine correspondences that specifically describe how the project is to proceed and the justification for a no-cost time extension." Appeal at 1. This office has conducted a *de novo* review of the documents at issue, and we conclude that the records contain material that is clearly pre-decisional and deliberative. The withheld documents set forth the opinions of employees who appear to be team members on the UPC project. The messages contain communications regarding strategy and problem solving on the project. [4]

C. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). NETL withheld six documents (five electronic mail messages and one memorandum) under Exemption 5 in their entirety but did not address the issue of segregability in the determination. This office reviewed a sample of the material that was withheld in its entirety, and based on our review, we find that NETL should reconsider the issue of segregability as regards several of the electronic mail messages withheld under Exemption 5. For example, our review of the six documents found that the electronic mail message dated January 20, 2005 between NETL and EE contains no segregable material. However, our review concluded that the remaining documents contain one or two sentences per message that could be released to the requester without revealing the deliberative process surrounding the UPC Project. *See Radioactive Waste Management Associates*, 28 DOE at 80,620. *Mead* states that non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead*, 566 F.2d at 261. Thus, even though there is a minimal amount of non-exempt material, only five documents are involved and segregation of that material should not pose an undue burden for NETL. Accordingly, this portion of the Appeal is remanded to NETL.

D. Fee Waiver Request

DOE charged Downs $200 for the 70 pages of responsive material it sent to Downs. In the Appeal, Downs requested that DOE waive the $200 charged for search and duplication of the material because, according to Downs, "the number of copies provided (70) is substantially under the number usually provided without charge (100) and . . . the information is in the public interest . . . ." Appeal

4 We note that NETL has provided an adequate description of the withheld documents. Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The NETL determination letter contained a description of the document, date, author and recipient. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000).

at 1. Downs went on to say that the responsive material will contribute significantly to the public understanding of DOE's "grant-making activities" and will not be used commercially. *Id.* at 2. NETL responded that this request should be denied because Downs has not supplied information to substantiate its waiver request.

DOE regulations state that OHA may rule on a fee waiver only after the FOIA officer has denied the requester such a waiver. 10 C.F.R. § 1004.8 (a). NETL has not denied Downs' request for a fee waiver because NETL never received such a request. Therefore, we have no jurisdiction over this portion of the Appeal. [5]

It Is Therefore Ordered That:

(1) The Appeal filed by Downs Rachlin on January 5, 2006, OHA Case No. TFA-0141, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 3, 2006

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5 We further note that an appellant may not expand the scope of a request on appeal. *See F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992).